



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable George H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Dear Sir:

Opinion No. 0-3785

Re: Employment of husband and
wife by a state department

Your letter of July 16, 1941, requests the advice of this department upon the question whether a husband and wife may both be employed by a state department under facts stated as follows:

The husband was employed June 15, 1941, his salary being paid out of an emergency appropriation made by the 47th Legislature, not out of funds appropriated in the departmental appropriation bill expiring August 31, 1941. The wife was employed during January, 1939, and resigned in January, 1941, to work in the Legislature during the past session.

The rider appended to S. B. 427, Acts of the 46th Legislature, relative to the employment of husband and wife, reads as follows:

"Employment of Husband and Wife Restricted. None of the foregoing appropriations for salaries shall be paid or warrants issued therefor by the State Comptroller to any employee until the employee shall have filed with the head of the department in which he or she is employed an affidavit showing his or her marital status, and if married, whether or not the spouse of such employee is also employed in one of the Departments of this State and the name of the Department where such spouse is

employed, together with the name of such spouse; the head of such department, in addition to the statutory affidavit now required to be attached to all payrolls, shall also set forth in the payroll affidavit that all of his employees have made the required affidavit and also set forth the facts of any said relationship employment as disclosed by said employees' affidavits, together with the name of the Department where such spouse is employed, and if such relationship employment does not exist then said affidavit shall so state, and the head of the department and the State Comptroller shall not approve for payment or issue warrants or checks for salaries to either the husband and wife where both said husband and wife are employed in the Departments of this State subject, however, to the following provisions. Affidavits of present employees shall be made and filed with the heads of departments of the State within ten days before the first day of each fiscal year, and persons thereafter employed shall file such affidavits before they begin work; all of said affidavits shall be preserved by the heads of departments for which appropriations are made for at least two years after their dates, which affidavits shall be open to public inspection; said employees' affidavits shall be conclusive evidence of the right of the head of the department to approve the payroll, and the payroll affidavit of the head of the department shall be conclusive evidence to the State Comptroller of his right to issue the warrants. In the event the Comptroller shall hold up issuance of any warrant by reason of these provisions he shall notify the head of the Department affected of his action and such warrants shall not be issued or delivered until the provisions have been complied with to the satisfaction of the State Comptroller; and in the event the head or heads of said departments, so employing said husband and wife, or said husband and wife themselves, cannot agree on which affected employee is to be retained in the State's employ, then the

State Comptroller shall issue and deliver the warrant to the affected employee who has been continuously employed in the State's service for the longer period of time, and refuse to issue and deliver the warrant to the other affected employee who has been continuously employed in the State's service for a shorter period of time than the other affected relative. The provisions herein shall apply to department heads and members of Commissions but not to the manager and matron of the Goree State Farm. The word 'department' as used herein shall mean those departments named in this Act and the Soil Conservation Board and shall not apply to other agencies of this State and the employees employed thereby.

"It is further provided that the foregoing provisions restricting employment of both husband and wife shall not apply to any persons who were employed and receiving compensation from the State at any time during the month of January, 1939.

" "

The first question which arises is whether a person employed and receiving compensation from one of the state departments covered in the Departmental Appropriation Bill, during January, 1939, and therefore within the proviso to the rider, is taken out of the proviso by reason of the fact that he or she transfers to another department of the Government. In other words, must there be continuity of service from and after January, 1939, in order for the proviso to apply?

This question, we believe, must be answered in the negative. There is an entire absence of language indicating the Legislative intent that continuity of service from and after January, 1939, is requisite to the application of the proviso. Such meager indications as are found in the language used reflect a contrary intent. For instance, the use of the words "at any time" during January, 1939, is incompatible with an intent to require even that there be continuity of service throughout that month. And the language of the proviso extending the

exemption to persons "employed and receiving compensation from the State," is broader than the scope of the rider itself, which applies only to "departments," a term specifically defined to include only the departments named in the Act and the Soil Conservation Board. The use of the term "State" in the proviso, in direct apposition to the term "departments" in the rider itself, must be deemed to reflect a deliberate choice of terms by the Legislature, and an intent to extend the exemption to those persons employed by other agencies of the state in January, 1939, who subsequently are employed in the "departments" covered by the rider.

Consequently, we hold that the rider does not apply to the wife in the instance given, since she falls within the proviso.

We are further of the opinion that, since the wife is within the proviso, and the prohibition is bilateral, the rider cannot be applied to the husband. To do so would put the department heads or the husband and wife to their election as to which should be retained in the State's employ, and this would be to apply the Act to the exempted person in violation of the terms of the proviso.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By (signed)
R. F. W. Fairchild
Assistant

RWF;db/JCP

Approved July 28, 1941
(S) Grover Sellers
First Assistant
Attorney General

Approved Opinion Committee
by B.W.B., Chairman